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This article was sent to us shortly before his death by Mr. McClennen, who was himself a distinguished lawyer, as an appreciation of his former partner, with a contribution to cover the cost of its publication. We take pleasure in printing it in accordance with his request.

Louis D. Brandeis as a Lawyer

Much has been printed of Louis D. Brandeis as publicist, humanitarian and Justice of the Supreme Court of the United States. The narrative following is supplemental. It is confined to a description of him as a lawyer as seen by an associate for twenty-one years, first as employee and later as partner, from 1895 to 1916.

Brandeis was not a great man because he was a great lawyer. It was the converse. He was a great lawyer because he was a great character. No one element will account for it. He was not a great orator in facile ability to substitute picturesque form for valuable substance. He did not tend to shake the jurors' hands or to caress their babies. His appeals were sincere and with a firm assumption that the tribunal addressed was fair and responsive to sound argument.

The prime source of his power was his intense belief in the truth of what he was saying. It carried conviction. Except in capacity to bring about a favorable settlement, he was no good on the wrong side of a case. He was quick to reach his own convictions, often because he presupposed, sometimes unwisely, an integrity like his own, in the man who sought his help; but he tested the man thoroughly where there were available means for the test.

Endless and untiring persistence in pursuit of what he believed to be the truth of the matter, was the next quality. If the objective was of some probable worth, no matter how little, he reached it, regardless of excessive expense of time and energy.

An incident furnishes a current and informed appraisal of this. In August of 1923 Chief Justice Taft said: Have you seen Brandeis lately? Is he getting a restful vacation? You can imagine the thoughts with which I approached a close association with him when I became Chief. You may not know how close and satisfactory that association has long been. I am worried about the way

he overworks himself. It is not only the personal friendship. It is that I do not see how we could get along without him. Do what you can to make him have a good rest this summer. I have talked to him again and again about his doing so much more on the cases assigned to him than is necessary, but it does not seem to have any effect. He keeps at it.

Next was his fertile imagination, aroused by so little provocations that it seemed like divination. In an unfamiliar set of figures, a reserve for guaranteed interest, recurring among the capital items, which would be passed unnoticed by many an expert, opened a trial for him, to water in the capital structure. Confidently he pursued it until the water was found. His cross-examinations were seldom explorations at large. They followed a premonition of what they would accomplish; and that premonition usually came from earlier extensive investigations of all the surroundings.

With all this, went a set of qualities, each of which might be found alone in many able lawyers. His special equipment was in possessing them all and in such a high degree. The bar of his time would be searched in vain for an equal in that respect.

From 1875 to 1895 and from 1916 to 1939, he was a constant and diligent student of law, with disposition and ability to grasp it readily. He was less in this study from 1896 to 1915, because then he was so extensively engaged in active affairs and so confident in his reliance on his law partners.

In 1877, under age for a degree in course from the Harvard Law School, hampered by ailment of eyes, burdened with tutoring to earn his way because his father had not recovered from the panic of 1873, he yet was awarded his degree cum laude, because of his brilliant record and a standing not only at the head of his class but also above that attained by any student for years before and after. James M. Landis, Dean of The Harvard Law School, says in the Harvard Law Review for December, 1941: "The story of his extraordinary scholastic record —the highest known—is substantiated by the records of the School. 'A' grades in those days began in the neighborhood of 90, as contrasted with the 75 of the present period, but Brandeis' two-year average stands at 97 and includes three marks of 100 and two of 99."

Recently there has come to light a letter written on March 17, 1878 by one of his Law School mates to the writer's mother, in

the course of which he says:—"It rains so unpleasantly tonight that my friend Brandeis and I cant go to make a call we had agreed upon—My f. B. told me it was dangerous to work too assiduously—and offered to introduce me to some friends of his—and this was to be the beginning thereof—My f. B. is a character in his way—He graduated last year from Law School and is now taking a third year here—was the leader of his class and one of the most brilliant legal minds they have ever had here—and is but little over twenty-one withal. Hails from Louisville—is not a College graduate, but has spent many years in Europe, has a rather foreign look, and is currently believed to have some Jew blood in him, though you would not suppose it from his appearance—Tall, well-made, dark, beardless, and with the brightest eyes I ever saw. Is supposed to know everything and to have it always in mind. The Profs. listen to his opinions with the greatest deference, and it is generally correct. There are traditions of his omniscience floating through the School. One I heard yesterday—A man last year lost his note-book of Agency lectures. He hunted long and found nothing. His friends said—Go and ask Brandeis (pronounce Bran' dis)—he knows everything—perhaps he will know where your book is—He went and asked. Said Brandeis— 'Yes—go into the Auditor's room, and look on the west side of the room, on the sill of the second window, and you will find your book'—And it was so."

Brandeis's grasp was comprehensive. By him as by Holmes, a precedent was viewed not merely as a decision on a particular point but as a pointed expression of an underlying principle which might call for an opposite conclusion on a set of facts closely resembling but slightly different either in embodiment, surroundings or time. He recognized that a lawyer, to be a safe guide, must know what has been decided, not because it predetermines the case in hand, but because it helps him to forsee what is going to be decided by the same or by another court at another time, with the light and the changes that the progress of the interval has provided. A man may see more than a giant saw if he stands on the dead giant's shoulders.

To him, the invaluable training in the Law School was but a start. He continued a student. On the margins of his early books, he has written developments as later decisions furnished them. In some branches of law and in knowledge of law as a whole he

was unsurpassed. First, to attract attention generally, was the development by Samuel D. Warren and himself, of the law of the right to privacy. Their article on this subject in the Harvard Law Review, December 15, 1890, often is treated as the beginning of the subject. His conception of the dignity of the individual can be seen as the prompter of this excursion. He was unusually familiar with the laws governing commercial relations. So was he with the laws governing fiduciary obligation in its wider aspects. He was peculiarly versed in the law limiting rate making by public utilities and to the more refined interpretation and application of that law. He had a comprehensive grasp of the law governing the relations between employer and employees, commonly phrased as capital and labor. He had a broad understanding of the fundamental principles which the Constitution provides to define the powers of Congress and of the legislatures of the States, absolutely and in their interrelation. He had a sensitive appreciation of the duties of courts to give no unauthorized pronouncement of the men in Congress, the force of an act of Congress, and of the correlative duty to abstain from any attempt to curtail the Constitutional powers of Congress, because of any opinion of the court that Congress had exercised its powers unwisely.

It was this last, that in later years gave him the name of a great liberal. He was a great liberal in the true sense. He saw the impact of fundamental and time honored principles as they met novel conditions. His vision was not obstructed by any barrier formed by the earlier application of those same principles to different conditions. He was not liberal to impair the barriers set by the Constitution to the attempts of men in Congress to make unauthorized pronouncements as if laws. He was not liberal in attempts of courts to usurp powers not judicial but belonging to the legislative branch of the government. He was as opposed to using or to permitting the use of other people's powers as he was to the unauthorized use of other people's money.

His liberal view, stood him in good stead throughout his practice. His inclination to see the principle on which a decision rested, and not merely the decision itself, enabled him to carry over from one branch of the law, into another, the essence of a decision, which some might regard as insulated from such an escape. Take for example,—the fiduciary obligations of a trustee

or of an agent meant to him not merely a feature of the law of trusts or of agency, but an obligation imposed by law upon those acting in a relation of confidence and arising from that relation, and wisely to be imposed by the law where a co-extensive confidence had been reposed and accepted, even if the name of trustee or agent was absent. The reason for the rule arrested his attention more than the rule itself.

The creative quality of his imagination, so helpful in investigation and in cross-examination, stood him in the same good stead when determining what the applicable law was going to be. It never failed to arouse the humor of those who knew him, to hear him called a radical. The principles that had been were the enduring foundations of all his thought; but he never stood still. His imagination never sought to uproot, but it projected the vitality of what had been done into the normal and healthy growth to come.

It is impossible in short space to give illustrations because his skill could be shown only by a careful examination of the problem with which he was dealing, with knowledge of what might have been done harmfully, and was not, and of how much was accomplished that a superficial account does not disclose.

His ability as a lawyer was the composite of a righteous disposition, great perceptive and reflective qualities, necessity to work, susceptibility to good influences, a broadening schooling in fundamental law, an acquisitive and retentive mind, a charming personality, and the rare capacity to select and to use forcefully the men available and the instruments at his command.

The description of his career as a lawyer should begin at his entrance into the Harvard Law School. This school was then some five years embarked on the Langdellian system, administered by a group of strikingly capable and broad-minded men. Brandeis was an excellent specimen with which to experiment with such a system, and the system was peculiarly well fitted for his needs and possibilities. His native originality was invaluable in the use of such a system. He would have been irked greatly by the older fashioned methods of studying law.

His outstanding success in the Law School gave him an unusual entry into the possibilities of the practice of law. Probably no one ever entered practice better equipped by Law School work and experience. The knowledge of his outstanding attainments

in the Law School and of his attractive character at once opened special opportunities for the beginning of a successful practice. They greatly diminished the need for connections of wealth, of commercial prominence and of social position, even in as definitely classified a city as the Boston of 1879.

In the period after his graduation from the Harvard Law School, and particularly in the first twenty years of it, he was close to the professors and to many of the graduates of the Law School. In the early eighties, in the absence of that master of the subject, James Bradley Thayer, Brandeis gave the course on evidence. Winthrop H. Wade relates that he took the course on evidence and took notes of it. Either the course was so good, or Wade's notes of it, that Oliver Wendell Holmes sought and obtained Wade's consent to keeping them for his own use.

In 1881-82, at the behest of James Bradley Thayer it is thought, he was one of those influential in securing the donation of the Weld professorship as a means to secure the addition of Oliver Wendell Holmes to the faculty of the Law School. The great advantages expected from this were cut short by the imperative call to Mr. Holmes to become an associate justice of the Supreme Judicial Court of Massachusetts.

In 1886 Mr. Brandeis was in the forefront of those who brought about the organization of the Harvard Law School Association. His interest in this was excited by his desire for the greater development of the Law School and for the expansion of the opportunities for other young men to obtain the advantages which had come to him from that school and its able faculty. There is a letter from him dated June 9, 1886 to Winthrop H. Wade, in which he says:

> "The pressure of trials has prevented my seeing you about the Law Association & today I learn from Mr. McIntire of your being in N. Y.
>
> There seems to be no chance of our getting the Association started by Commencement, but I think, on the whole, we have gained by the delay. The 250th Anniversary of the College in Nov. will afford us an admirable opportunity for organization & I think all our efforts should be directed towards getting the Association in good shape for that time.

> If you agree with me, please start the idea among our friends in N. Y. and get Mr. Carter's views. Of course he must be our honorary member.
>
> There are a number of my class mates in N. Y. who would, doubtless, be interested in the contemplated Association & I wish you might find time to see them."

It was in the following month that a volunteer committee was formed. This started the project on its way.

Brandeis became secretary of the Association. He was for years very active in that office. His services to that Association are said to have prompted the University to confer an honorary A.M. on him in 1891.

His efforts continued for years after the organization of the Association. In 1895, when the Association gave its dinner in recognition of the twenty-five years of service to Dean Langdell, there was gathered a most distinguished body of lawyers from all the United States and from as far as England and Japan. The help of Brandeis in bringing this about was recognized. Said one man to another at the gathering: How did this great body of such eminent lawyers get here? The other replied: Why, Brandeis got them here. This superlative according of credit for that to which many may have contributed was but a pardonably excessive recognition of his energy and capacity in the legal world.

His work for the Association is described by Dean Landis in the memorial number of the Harvard Law Review for December 1941.

As soon as the idea of a Harvard Law Review came into being, those who had thought of it naturally turned to Brandeis for assistance in putting it into effect. From 1887 to his accession to the Bench in 1916, he was actively interested in the success of the Review. The article which Samuel D. Warren and he contributed on the Watuppa Pond cases in the Harvard Law Review for December, 1888, is valuable now for comparison with the opinions which he wrote from thirty to fifty years later as a justice of the Supreme Court of the United States. At this early time, when he was thirty-two, there appears the same disposition of approach that had the striking illustration twenty years later in the brief in *Muller* v. *Oregon,* to be mentioned later, and in his opinions as a justice. The Watuppa article starts by attracting attention to

the relation of the cases to manufacturing communities depending on water supplies which had been created in an undulating country by the investing of capital in impounding works in reliance on a statutory policy. The impact of this decision might have been wholly different in a different locality, just as a six-hour law in a rural, agricultural community might be so different in degree as to be different in kind from one in an industrial pursuit, where intensity and nervous strain would develop the toxins of fatigue. He showed the fine common law mind which, in declaring the law out of the void, has done it with a regard for what was conceived to be best for the community or the state to be ruled by it. His approach was free from that deference to forms and shells which have restricted vitality.

Brandeis entered on the practice of law doubtless with the predominant objective necessarily to earn his own living in a respectable way, and so to pull his own weight in the boat. The interest in public affairs and in the general betterment of the community about him, which became so intense in later years, had nothing in it abnormal in the eighties. He was in the common sense of it just a practising lawyer of the first water and an unusually attractive and cultured gentleman.

His partnership with Samuel D. Warren, Jr. in 1879 was the direct product of his Law School career. The association there developed a respect, admiration and affection on both sides which never ended. This partnership had an easy opening to a desirable law practice. Warren's father was not only a successful manufacturer and man of business, but he was also a highly respected citizen in Boston's commercial world. Brandeis never tired of telling how that success had come so largely from a far-seeing, broad-minded commercial sagacity that sought to advance trade, not by overreaching acuteness, but by liberal regard for the interests of his customers and in a reliance in times of stress on their proven honesty more than on their accumulated assets. Here, Brandeis's susceptibility to such influences stood him in good stead.

To be known as counsel for S. D. Warren & Company was no mean start to begin building a law practice in the commercial field.

At the same time his reputation as a lawyer and desirable associate was growing over the United States among the lawyers who had known him in the Law School or who were within the

influence of the atmosphere of the Law School. He was becoming favorably known to the intellectuals of the Boston community, some of whom were engaged in large affairs in the business world and in the field of benevolence and applied charities.

From these various sources came a growing practice, rapidly increased by the capable and satisfactory manner in which it was handled. In this there was nothing spectacular. There was nothing in his courtroom methods or manner which brought him any fame not deserved by the substantial quality of the work done and by the results accomplished.

On his own conception of the requirement for a successful practice and for real service therein, a clear light is thrown by a letter which he wrote when fourteen years in practice and thirty-six years old. In the course of this letter dated February 2, 1893, addressed to a younger man, then only a short time at the bar, he says:

> "Cultivate the society of men—particularly men of affairs. This is essential to your professional success. Pursue that study as heretofore you have devoted yourself to books. Lose no opportunity of becoming acquainted with men, of learning to feel instinctively their inclinations, of familiarizing yourself with their personal and business habits, use your ability in making opportunities to do this.
>
> . . . . . .
>
> "The knowledge of men, the ability to handle, to impress them is needed by you—not only in order that clients may appreciate your advice and that you may be able to apply the law to human affairs—but also that you may more accurately and surely determine what the rules of law are, that is, what the courts will adopt. You are prone in legal investigation to be controlled by logic and to underestimate the logic of facts. Knowledge of the decided cases and of the rules of logic cannot alone make a great lawyer. He must know, must feel 'in his bones' the facts to which they apply—must know, too, that if they do not stand the test of such application the logical result will somehow or other be avoided. . . . . .
>
> "If you will recall Jessel's opinions you will see what I mean. Knowledge of decisions and powers of logic are

mere hand maidens—they are servants not masters. The controlling force is the deep knowledge of human necessities. It was this which made Jessel the great lawyer and the greater judge. The man who does not know intimately human affairs is apt to make of the law a bed of Procrustes. No hermit can be a great lawyer, least of all a commercial lawyer. When from a knowledge of the law, you pass to its application the need of a full knowledge of men and of their affairs becomes even more apparent. The duty of a lawyer today is not that of a solver of legal conundrums: he is indeed a counseller at law. Knowledge of the law is of course essential to his efficiency, but the law bears to his profession a relation very similar to that which medicine does to that of the physicians. The apothecary can prepare the dose; the more intelligent one even knows the specific for most common diseases. It requires but a mediocre physician to administer the proper drug for the patient who correctly and fully describes his ailment. The great physicians are those who in addition to that knowledge of therapeutics which is opened to all, know not merely the human body but the human mind and emotions, so as to make themselves the proper diagnosis—to know the truth which their patients fail to disclose and who add to this an influence over the patient which is apt to spring from a real understanding of him.

"You are inclined to look upon your duty as if it were merely to take a rule of law and apply it to the facts given you, to blame the client if he fails to give you all the facts and to assume that the 'blood must rest on his head' if the rule of law when applied to those facts works badly. On the contrary your duty is as much to know facts as law—to apply from your own store of human experience the defects in the clients' statements and to probe the correctness of those statements in the light of your knowledge. That knowledge must also enable you to determine the practical working of the advice you are to give.

. . . . . .

"Your law may be perfect, your knowledge of human affairs may be such as to enable you to apply it with wis-

dom and skill, and yet without individual acquaintance with men, their haunts and habits, the pursuit of the profession becomes difficult, slow and expensive. A lawyer who does not know men is handicapped. It is like practicing in a strange city. Every man that you know makes it to that extent easier to practice, to accomplish what you have in hand. You know him, know how to take, how to treat him; he knows you and the transaction of business is simplified.

"But perhaps most important of all is the impressing of clients and satisfying them. Your law may be perfect, your ability to apply it great and yet you cannot be a successful advisor unless your advice is followed; it will not be followed unless you can satisfy your clients, unless you impress them with your superior knowledge and that you cannot do unless you know their affairs better than they because you see them from a fullness of knowledge. The ability to impress them grows with your own success in advising others, with the confidence which you yourself feel in your powers. That confidence can never come from books; it is gained by human intercourse.

"Intercourse with and knowledge of men will also develop in you power to assume responsibility without which the successful practice of the profession is impossible.

. . . . . .

"Again intercourse with men would afford what you greatly needed relaxation. A bookkeeper can work eight or ten hours a day, and perhaps twelve year in—year out and possibly his work may be always good (tho' I doubt it). But a man who practices law—who aspires to the higher places of his profession—must keep his mind fresh. It must be alert and he must be capable of meeting emergencies—must be capable of the tour de force. This is not possible to one who works alone—not only during the day but most of the night—without change, without turning the mind into new channels, with the mind always at the same tension.

"The bow must be strung and unstrung; work must be measured not merely by time but also by its intensity;

there must be time also for that unconscious thinking which comes to the busy man in his play: I am convinced that your work would be better if it were more varied."

This letter discloses another trait—selection prompted by the qualities of the court or person, to whom argument was addressed. The younger man was a great student, learned not only in law but in the biography of lawyers at the Bar of England. Jessel was a convincing example to choose, to make the desired impression on such a mind. To another, the name might have carried little weight. For such a one, Brandeis would have selected another name.

At all times his consulting and advising practice exceeded his trial practice. His work in trials was largely an outgrowth from his consulting and advising practice. The trials which he conducted were largely for clients in this general practice and not because of spectacular achievements in work in trials. Lawyers who saw him in trials recognized quickly the masterly way in which he conducted a trial and his thorough understanding of his case, gained as only it could be by a combination of careful, and often laborious, preparation and a very unusual capacity to acquire and to remember information and to regulate its use to the best advantage.

Several things combined to keep him from becoming a constant courtroom senior advocate. One was the constantly growing pressure upon his time which his general practice had brought, well before he had reached forty years of age. Another was that before this time, concurrently with his relief from the duty to earn a living and his lack of interest in the mere possession of wealth, there began to mature this intense sense of duty to work for the well-being of the community. Another was his predilection for getting other people to do and to have the credit for doing what he felt that they could do as well as he could. Another, fusing with this, was that, although so young in years for a successful lawyer, but mature in an established practice, he had attracted to him some of the better men of the day coming out of the Harvard Law School, and in whom he quickly acquired great confidence.

Everything that could, in his belief, with safety be turned over to them, was put in their charge. The not wholly rare trait

of a senior to keep the glory regardless of the men in the ranks who were doing the fighting was conspicuously lacking in him.

On August 19, 1896, in a letter relative to business organization for lawyers' offices, he said:

> ".... On some general considerations however much previous thought has led me to these conclusions:
>
> "First: The organization of large offices is becoming more and more a business—and hence also a professional necessity,—if properly planned and administered—it must result in the greatest efficiency to clients and the greatest success to the individual members both pecuniarily and in reputation.
>
> "Second: In such an organization the place of each man must be found—not prescribed. The advantage of the larger field is that every man has the opportunity of trying himself at everything and anything—and by a natural law comes to do these things that on the whole he does most effectively.
>
> "Third: As to that class of things which the individual makes his own, he must become in the office in time the principal—for those dealing with the office learn that he is considered the authority there on those things and shortly follow suit; the duration of time required for this public recognition and its extent depend on personal qualities—largely independent of intellectual ability and attainments—namely the ability to impress one's personality upon others—and of creating followers. In other words a reputation in the practical world to which the practice of the law belongs—is determined by a large number of qualities and in a proper organization they have even better scope for effectiveness today than in individuals standing alone.
>
> "Fourth: Besides the things as to which the individual becomes the principal—there must be always much as to which he is the associate, the Junior or

> Senior of the others in the organization and every man must stand ready to give every other man full aid. Every man also must hold himself to a stricter performance of his task—on account of his relations to the others.
>
> "That such organizations are the most effective means of doing the law work of this country—so far as clients are concerned—is proven by the success of the great New York firms—the pecuniary success and the professional success or reputation of the individual members. This reputation has in no sense been dependent upon the individual's name appearing in the firm designation. Beaman was known everywhere before Southmayde's retirement gave his name a place in the firm—and Treadwell Cleaveland is now reaching the point of reputation which Beaman had a few years ago. In Alexander & Green, John J. McCook reached the pinnacle in 1888."

As a result of the several causes above noted, his participation in active trials in court after 1897 was infrequent. He was still guiding in the courses to be pursued. His presence in court when it occurred was frequently for no reason except to relieve the apprehension of the client who believed that he was the only one that could really do the job to perfection.

In the twenty years before he went on the Supreme Court in 1916, his advocacy was largely before tribunals other than courts, and to a great extent for public causes. Even in these, his work was that of a lawyer.

His fight against giving to the street railway companies the franchises for the subways and his support of the plan to have the subways community owned and leased to the operating company, and his fight to keep the rental to be paid by the operating company to the public owner higher than the Railway Company wished to pay were all carried out in the spirit and with the implements of a lawyer. He gathered and marshalled his evidence and he argued his case, as before a jury or a court, to convince the body addressed, of the soundness of the position which he took. He was the counsel in opposition to the counsel for the Railway Company. He did not go at it as a spellbinder.

Much earlier he had been employed counsel in the public in-

stitutions' investigation. He had conducted himself there in the same lawyerly spirit.

In the latter nineties, when he acted for the Free Trade Association in the hearings before the Ways and Means Committee considering the formulation of a new tariff act, he acted as a lawyer and presented his case in the same lawyerly way, just as the contra position might be presented by the lawyer for a protected industry or association of industries.

His investigation into the financial structure and causes of financial weakness of the railroads was as a lawyer. The novelty of his methods was no greater than that employed on the constitutionality of the Oregon law limiting the hours of labor. They were superlatively lawyer-like methods,—the methods of an extremely able lawyer.

The investigations into the grounds for complaint against existing insurance systems and methods were conducted from a lawyer's standpoint. He was convinced that something was wrong. He had the true lawyer's enthusiasm to bring about instead what was right. It was not at all a fight for paupers, or even for those of low income. He felt that in a business conducted so largely on a mutual plan the interests of the great mass of the insured,—poor, easily circumstanced, and wealthy,—were incoherently represented, and that those interests should have the advantages of the lawyerlike work of a first rate lawyer.

This was not due to a peculiar affection for the underdog; it was due to the refined lawyer's desire to bring about justice.

His conception of the Savings Bank Insurance plan and the great amount of effort that he devoted to the creation of the system and the extension of its use was a natural result for him. When a trouble was brought to his attention as a lawyer he was quick to become aroused to a lawyerlike search for the cause and to an effort to provide a remedy.

An example of his work as a lawyer, that has a ready appeal to any experienced legal advocate, is in the brief and argument as to the constitutionality of the Oregon law limiting the hours of labor for women. This case, *Muller* v. *Oregon*, 208 U. S. 412, was argued and decided in the early part of 1908. Reference has been made to it many times for the light which it throws on the character of Mr. Brandeis and as a specimen of his work for the oppressed; but its most proper bearing is on his work as a lawyer.

It is true that he was importuned to go into it by those interested in the welfare of overworked women. This was a course which had a strong appeal to him. It was enough to make him look into the questions involved. This done, the impelling cause of his taking the case up was that in the state of the decisions he saw grave danger that a judicial error might be made if the case were presented in the routine manner, and that therefore he ought to do what he could to secure the right decision.

In 1916, Roscoe Pound, then Dean of the Harvard Law School, was one of the first to point out the right use of this case in an appraisal of Mr. Brandeis. He wrote:—"His friends, as it seems to me, make a great mistake in urging as his chief qualification his views upon social questions and the eminent services he has performed in the public interest. Important as these matters are, their importance does not lie immediately in the direction of qualification for the bench. What is not so generally known is that Mr. Brandeis is in very truth a very great lawyer. At the beginning of his career his article in the Harvard Law Review on the right of privacy did nothing less than add a chapter to our law. In spite of the reluctance of many courts to accept this, it has steadily made its way, until now it has growing preponderance in its favor. All the cases upon this subject concur in attributing the origin of the doctrine to Mr. Brandeis's paper. The promise thus given has been amply fulfilled. One might instance the revolution which his brief in *Muller* v. *Oregon* achieved in the matter of arguing cases involving the constitutionality of social legislation. The real point here is not so much the advocacy of these statutes as the breadth of perception and remarkable legal insight which enabled him to perceive the proper mode of presenting such a question."

The danger of adverse decision in 1908 was presented focally by the decision only three years before in *Lochner* v. *New York*, 198 U. S. 45. In this case the Supreme Court of the United States had held unconstitutional the New York labor law making it an offense for an employer to require or permit an employee to work for him in a bakery more than sixty hours in one week. In the prevailing opinion in the case there was no suggestion that a different rule would apply to a statute limited in application to women only. The majority of the Court had held it impossible to say that it was a health measure. The only change in the per-

sonnel of the Court was that Mr. Justice Brown was no longer there and Mr. Justice Moody had been appointed. The occupation had been decided not to be a dangerous one. The Oregon law was not limited to dangerous occupations.

The common, intelligent approach to the question presented in the Oregon case would be to align the decisions that were favorable and to point out extensively the distinctions in the unfavorable decisions. Such a course would not make a very impressive showing for the validity of the Oregon law. Instead of pursuing this course, Mr. Brandeis based his brief and argument on the principle which the Supreme Court itself had announced, that the legislature of a state could interfere with the liberty of contract in a proper case, for the protection of the health of the workers, and that the legislature was, within the prescribed bounds, the body to determine whether the restriction on liberty was required, and the propriety of the means adopted to preserve health.

From this principle he proceeded in brief and argument to present not refinements or extensions of principles of law, but facts disclosed by scientific investigation which had become the kind of common knowledge, of which the Court could take judicial notice, when brought to its attention.

As he viewed it the Court had not departed in the Lochner decision from the applicable principles of law but, on the contrary, had misapplied those principles through a failure to have a realizing sense of the facts of common experience in the working world.

The lawyer's only hope of success in the case was by taking this opportunity and performing this duty to bring home to the Court a convincing sense of these facts of common experience.

It all looks very simple today, but in 1907 it involved a creative mind and an intelligent perception of the way in which to carry out the project. It did not require the inclinations of a sociologist or the attributes of benevolence. It required the perception of a skillful lawyer.

Once the pattern for the brief had been laid out, the extensive embodiment could be provided by intelligent assistants. The service of highest value in the operation was furnishing the perception; and this required only a very short time.

However, it is improbable that even this excellent and peculiarly apposite brief would have accomplished the result if it had not been supported by the impressive oral argument which he

made. The impressiveness was due not so much to the peculiar things said as to the respect which he had long since engendered with this Court, for his intelligent grasp and for his sincerity. The Court in the opinion took the unusual course of speaking of him by name.

He obtained a unanimous decision in favor of the Oregon law. The distinction between a law confined to women and one applicable to men as well as to women gave an opportunity for a decision not too manifestly inconsistent with the earlier decision. Viewed in retrospect there can be little doubt that the distinction is not the cause of the difference in the two decisions. The work of Mr. Brandeis had improved the vision of the Court when approaching the application of well-established principles of constitutional law to the facts of common affairs.

By his work in this case he invited lawyers to an avenue of approach which since has been trod frequently.

This argument was made when he was in his fifty-second year and near the close of his experience as a lawyer in court. It was in his fullest maturity as a practising lawyer.

When he was employed as Special Counsel for the Interstate Commerce Commission in 1914 to assist in developing the evidence of the facts which would be of value in determining with justice the freight rates subsequently to prevail, he approached the subject from a thoroughly lawyerlike standpoint and as an advocate not for the people or for shippers of the country, but for a commission whose only interest was to get knowledge of the facts to enable it to determine justly between railroad and shipper what was the proper rate. He proceeded in his lifelong, lawyerlike way of diligently finding out the facts and marshalling them in such a way as to persuade the judging body of the rightness of the course which he advocated.

In the course of all his advocacy it is believed there cannot be found a catchy phrase unwarranted by the substance back of it. The often quoted statement that the railroads might save a million dollars a day was not just an exciting phrase. It was a plain statement of a simple fact, of the existence of which a long and careful investigation had convinced him.

The way in which he put the interest of his client and of the cause committed to his care above any interests of his own was one of the things which made him a very great lawyer and also

did him temporary personal injury. It did it in financial return from the practice of the law. It did it in personal popularity.

From 1879 to 1916, he was practising law in a community of great wealth in the aggregate. That wealth was in the control of a minority of the community. From 1897 to 1916 it was obvious when he undertook the tasks in the community interests, that many of his contentions were offensive to that minority. Experience has shown that his advocacy of these courses did not influence a more lucrative practice to him, and that it deterred some of the natural flow, as the currents of it had already taken direction years before. When he entered upon these courses these consequences were foreseeable. This did not deter him.

Popularity at the bar did not deter him from the advocacy of a client's cause. This putting of his client's interests above his own and the effect of it on him had a striking illustration early in his career. One cannot know whether the effect on his popularity ever wholly vanished.

Some fifty or more years ago he became convinced that his client had been much overcharged. This had been accomplished in the way about to be described. There were provisions in the law that a successful litigant was entitled to recover not merely his claim and interest, but also costs at a rate defined by set statutory rules. These costs were not fixed by actual disbursements, and they were small in amount. It was the practice among some lawyers for the lawyer for the successful party to retain these costs as a part of his compensation for the services rendered. It is safe to say that these allowable costs were never in excess of proper compensation for the services rendered. They ordinarily fell far short of it. In the case in hand many suits, substantially identical in form and substance, had been brought against many defendants for a single plaintiff. The successful result in one of the cases was a virtual demonstration that the plaintiff was entitled to recover in all of them. The costs in all of them were retained by the plaintiff's lawyer. The plaintiff was convinced, and convinced Mr. Brandeis, that this resulted in giving to the lawyer much more than just compensation for his work. This presented the issue whether it was right to retain all these costs. In the contest which ensued some leading members of the Boston bar, fully a generation older than this young man from Kentucky, testified to the prevalence of this course of treatment of costs.

The client's interest dictated the vigorous pursuit of the client's rights without any craven subservience either to the comradery of the bar or the austere dignity of these leaders of it. It is useless to hazard a guess as to how many young lawyers would have let their desire to stand well with their fellows obstruct a thorough cross-examination, as thorough as would be conducted unhesitatingly of the ordinary man in the street. Brandeis would not compromise for his personal benefit on what he thought his duty to his client required. Accordingly, he conducted a cross-examination which offended the dignity of these elders and left an impression on them unfavorable to this young man. That impression circulated beyond the particular men involved and created an attitude in some groups which lasted years after the cause of it was forgotten. This planted germs of a wholly unwarranted dislike of him, the extent of the growth from which can never be known.

This incident brings forcefully to the attention of the young and unestablished lawyer how far he will sacrifice his personal popularity among his fellows at the bar out of consideration for the rightful interests of his client. It is a question which Brandeis did not find it difficult to answer. Very likely he never was aware of the extent of the consequences of this one incident. The secondary effect probably ran beyond those who had any knowledge of this cause. It played its part some twenty-five years later with lawyers ignorant of it. One of those speaking in support of the confirmation of Mr. Brandeis in 1916, probably wholly ignorant of this old occurrence, accounted for the opposition in this way:—"By way of explanation, may I say that we have what I may call an aristocracy of the Boston bar. I do not use the word at all offensively; on the contrary, they are high-minded, able, distinguished men. But they can not, I think, consider with equanimity the selection of anybody for a position on the great court of this country from that community who is not a typical, hereditary Bostonian."

Among his contemporaries and juniors at the bar Mr. Brandeis was held in high esteem as a man of high character and great ability. Any defections from this view were traceable to enmities or adverse interests of those whom he crossed and to others sympathetic with them.

From the outset, the practice which came to him was a general one, unusually diversified. It did not fall into a single

class. It broadened rather than narrowed with the lapse of time. He acted for manufacturers, for merchants, for investors, for brokers, for associations of these different ones, for labor unions, for the injured, for the successful, for the unsuccessful, and for benevolent institutions. There was no field not included except it be in the defense or prosecution of alleged criminals, the department of patents, and admiralty. Even in these unaccustomed fields he worked occasionally.

His practice was lucrative. This was due to the character and volume of the matters handled and the quality of the work done. He made scrupulous effort never to overcharge, and to scrutinize the measure of fairness. The fortune which he left tells the story of the value of the professional work which he did. It was wholly the product of that work and of the wise conservation of the money which came from that work. He invested most conservatively. The value of his investments seldom increased or decreased materially. He never speculated. His extremely abstemious ways of living made little draft on his income. His savings began to accumulate early and gathered increase at conservative rates. This all enters into his character as a lawyer. His own course coincided with the advice that he gave to his clients as far as in their differing positions it was applicable.

It was his belief that the chance of success was not great in business or in ways to which one could not or did not give attention, and that the practice of law successfully, required the giving of attention to that, to the exclusion of outside personal business interests. He felt that if a lawyer engaged in business and did not give it attention, he was probably engaged in a losing operation, and that if he did give it attention it was almost sure to be at the expense of his effectiveness as a practising lawyer.

The same liberal fairness which had characterized him in his outside relations was even more emphatically practised with those who were associated with him as partners in the practice of law. Except for Mr. Warren, who ceased to be an active partner with him in 1888, when the death of the elder Warren required his son to give attention to the manufacturing business which his father had built up, all the men who subsequently became Mr. Brandeis's partners came into an existing practice as young men out of the Law School. The impetus of the office was his. From the inception of the firm of Brandeis, Dunbar & Nutter in 1897, the finan-

cial advancement of these younger men was never the matter of negotiation. He was always ahead of the need for it. The increases to them were his proposals. They were never made sentimentally or extravagantly. They were always on the liberal side of fairness. He endeavored to work out a formula with an appropriate factor for the source of the particular matter, whether it was a novel contribution of the particular man or was a matter which came to Mr. Brandeis individually, or was attributable to the acquired prestige of the office. Then came the estimate of the value of the work done by the different members. From time to time in this way, came his estimates of the shares which his younger partners should have in the net receipts of the firm. His process in this operation was characteristic of this lawyer. His partners never attempted to follow the intricacies of the formula, but they always felt themselves fairly and liberally treated in the internal readjustments which he proposed.

His liberality in determining the shares of his partners took into account fully the fact that he was devoting a large amount of his time to matters of public interest which brought no financial return to the firm. However, most of these matters, even if he had not taken them up, would have produced nothing for the firm. Occasionally persons having a private interest in a matter of public concern would go to Mr. Brandeis to retain him to support that private interest, and in ways that were entirely consistent with what he believed to be the public interest. He preferred to act in the public interest and not to accept the private employment. He perceived that this course in turning away retainers would diminish the income of the firm. In such case, he determined what would have been the proper amount to be charged if he had accepted the position of privately paid counsel. This done, he paid the amount personally to the firm. His partners never sought anything of the kind or suggested it. The amounts which he paid to the firm in this way were substantial. The largest single amount was $25,000.

In the law partnership formed in 1897, he created a unity which was a tribute to his skill and disposition. It was the firm that did the work as a unit, with the effort to have it done by the individuals best fitted for the particular type of work and with complete freedom from internal rivalry, and without regard for

the source of the particular matter except as the client's wishes must be met.

With the courts and with the outside world there was the constant effort to put his junior partners forward as fast as he became convinced that they were reliable for the task, and as the real man who had thought the thoughts and accomplished the result. There is no instance known of his seeking personal fame or even accepting it for the accomplishments of one of his partners. His pride in them and in their achievement was great. Nevertheless, inevitably and notwithstanding his efforts the firm, even as late as 1916, was not uncommonly referred to as Brandeis's firm. From this grew one of the acid pleasantries of one of the opponents of confirmation. The firm address was: Top Floor, 161 Devonshire Street. The genial remark was: Hereafter they will be practising on the roof.

The course of this firm after 1916 has no place in the present discussion, but it is in a very real sense a creation of Brandeis's genius as a lawyer.

In the twenty years preceding 1916, so well had he knit together this firm that it is difficult to speak of his practice in that twenty years. It was the firm that was practising in that period. There were many things in that practice which he came to believe could be handled better by one or another of his partners than by himself. He acted on this belief. Therefore, to describe his practice as a lawyer in this period, largely would be to describe the practice of this firm. In earlier years he had been actively engaged in the different courts of the Commonwealth and in the United States courts of the First Circuit and to some extent in the courts of other Circuits and of other states. His first presently known argument in the Supreme Court of the United States was in the early part of the nineties. In the ensuing twenty years he appeared before that court from time to time, but not with great frequency. The latter half of this period the court activities of the firm had passed largely into the hands of his partners.

This fact had its effect not only on the frequency and extent of his appearance in court, but also on his contacts with opposing counsel in litigation. In the twenty years before 1916 his contacts in practice with other lawyers was confined very largely to matters of advice and negotiation. Many of the active trial lawyers of this period rarely if ever met him. This had its effect

upon his comradeship at the bar. His long and frequent absences in response to calls elsewhere also had its effect. He had always been engaged on serious pursuits which left little time or strength for the jovial meetings of the lawyers of Boston.

Added to these circumstances was his conviction that it was important for lawyers to be in the casual contacts of men of other pursuits and professions. He had doubts of the advisability of lunch clubs confined to members of the bar because they cut down the opportunities for interchange with laymen.

For many years ending in 1916, he was in almost daily contact with one or another of his law partners. Three of these men were with him for more than the preceding twenty years. They were men disinclined to permit their good judgment to be swayed by their emotions. One and all of them had a respect and admiration for his great abilities and his high character that is an eloquent tribute. The personal affection which he engendered in them was lifelong. Their contacts with him after he ascended the Bench of necessity became less frequent, but they were many. They were cherished meetings.

Mr. Brandeis's inclination was strong to work and to have others work with the instruments at hand, even if not wholly satisfactory, rather than to go hunting for new ones, and to experiment with them without good reason to believe that they would be better. An illustration of this occurred in the case of a client with religious inclinations who, notwithstanding continuing success in a manufacturing business, with prospects of greater, evinced a disposition to give it up and go into the ministry. Mr. Brandeis laid before him the prospect that he could do more good by continuing a business in conformity to his religious principles and the treatment of his large body of employees and his customers in accordance therewith, than by swapping so late in his course to the ministry. The outcome showed the wisdom of the advice.

This was but a part of his conception of the duty for any man, and not merely for lawyers, to serve the common well-being in the times and in the circumstances in which he lived and had become fitted. This inclination which led him to advise a capable manufacturer to make of his opportunities and his equipment a ministry, came out again in his address on Commencement Day at Brown University, which was published in System for October,

1912, and appears in the volume, "Business a Profession", by Brandeis, published in 1914. Here he is found urging against the tendency to make the practice of law a business. He seeks to substitute for it the elevation of business to a profession, with the obligations of the noblesse oblige which in that address he so cogently described.

With this same sense of duty before him, a duty as he viewed it resting upon every one of skill, he expressed regret early in this century that Mrs. Fiske, whose abilities as an actress he greatly admired, should, as he viewed it, prostitute those great abilities to the portrayal of such an unlovely and debasing a character as Becky Sharpe.

The effect upon the future of the community, of any act done or any course pursued was ever present in his mind. It was this saturation with duty, intelligence and sincerity which made him the great advocate.

On December 16 and 17, 1914, near the close of his career as an advocate, Mr. Brandeis argued in the Supreme Court of the United States. On the afternoon of December 17 one younger friend wrote to another:—"I have just heard Mr. Brandeis make one of the greatest arguments I ever listened to, and I have heard many great arguments. He spoke on the minimum wage cases in the Supreme Court, and the reception which he wrested from that citadel of the past was very moving and impressive to one who knows the Court. . . . When Brandeis began to speak, the Court showed all the inertia and elemental hostility which Courts cherish for a new thought, or a new right, or even a new remedy for an old wrong, but he visibly lifted all this burden, and without orationizing or chewing of the rag he reached them all ....."

At another time, in describing the proceedings at a hearing in the legal field, another lawyer said:—It began in the habitual way but it had not gone far before, as usual, Brandeis was in full command by common consent.

The impression that he made upon clients was deep. They sought his advice as a lawyer, but as a lawyer with an unusual comprehension of common affairs. He advised his clients comprehensively. He received from them a corresponding response.

His character and his career furnish the lawyer much of inspiration; but, imitation would be dangerous. It is like relying on a flush when holding only four cards of the suit. One cannot imitate originality without having originality. In the forefront was his creative imagination which mapped the way for his great industry and his intelligent grasp, to follow. All in all, he stood in the front rank of greatest lawyers.

EDWARD F. MCCLENNEN

October 30, 1947